IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 8, 2008

WENDY WILSON ET AL. v. BATTLE CREEK MILLING & SUPPLY, INC.

Appeal from the Circuit Court for Marion County
No. 17390 Buddy D. Perry, Judge

No. M2007-02830-COA-R3-CV - Filed December 19, 2008

The plaintiffs filed this action to domesticate a default judgment awarded in the Circuit Court of Virginia against the defendant Battle Creek Milling & Supply Co., Inc., for breach of contract. When the plaintiffs sought to domesticate the foreign judgment, Battle Creek filed a Motion to Dismiss and Motion to Require Arbitration in which it contended the Virginia court lacked jurisdiction because the contract contained a mandatory arbitration provision. Battle Creek also contended the judgment was void because service of process was insufficient. The Tennessee trial court denied Battle Creek's motions and entered an order domesticating the foreign judgment. This appeal followed. We affirm the trial court in all respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Brent James, Rossville, Georgia, for the appellant, Battle Creek Milling & Supply Co., Inc.

John H. Cameron, Jr., Jasper, Tennessee, for the appellees, Wendy Wilson, Elizabeth Walters, Evan Wilson and Danielle Wilson.

OPINION

The record in this action is exceedingly sparse; nevertheless, we know the plaintiffs, Wendy Wilson, Elizabeth Walters, Evan Wilson, and Danielle Wilson, residents of Gloucester, Virginia, entered into a "Sales and Purchase Agreement" in December 2005 with Battle Creek Milling & Supply Co., Inc., a Tennessee company doing business as Battle Creek Log Homes.[1] Pursuant to the agreement, Battle Creek was to deliver to the plaintiffs "a log home package" including materials

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[1] The contract, which is in the record, was for the purchase of a log home to be constructed in Yorktown, Virginia. The contract listed the plaintiffs' address as Yorktown, Virginia, and Battle Creek Milling's address as 9955 Ladds Cove Road, South Pittsburgh, Tennessee. The contract also stated that it "shall be governed and construed in accordance with the laws of the State of Tennessee."

as specified in the agreement, which was to be shipped by Battle Creek to the plaintiffs at an address in Gloucester, Virginia. The total purchase price, including shipping, was $116,319.00, the balance of which was to be paid in full by the plaintiffs at the time of delivery. The record does not tell us, but we can assume from the briefs and the record, that the log home package was delivered by Battle Creek to the plaintiffs in Gloucester, Virginia, after which the plaintiffs incurred problems with the log home package, which gave rise to the breach of contract action.

The plaintiffs filed the underlying action on November 9, 2006, in the Circuit Court of the County of Gloucester, Virginia against Battle Creek Milling & Supply Co., Inc. d/b/a Battle Creek Log Homes alleging breach of contract based upon the defendant's shoddy workmanship. Summons was immediately issued and the record contains a return of service of process, sworn to by a Deputy Sheriff of Marion County, Tennessee. The return of service indicates that the Deputy Sheriff served the complaint and summons at Battle Creek's offices at 9955 Ladds Cove Road, South Pittsburg, Tennessee.[2] The return of service expressly states that summons was served on T. Allan Holland at 9:25 a.m. on Tuesday, December 19, 2006. It is undisputed that Battle Creek never filed an Answer, or a responsive pleading or motion, and never made an appearance in the Virginia court proceedings.

On April 23, 2007, upon the motion of the plaintiffs, the Circuit Court of Gloucester entered an Order for Default against Battle Creek finding Battle Creek was served with process on December 19, 2006, and that Battle Creek had failed to file an answer, responsive pleading, or make an appearance within 21 days after service of process.[3] On May 3, 2007, a hearing was held to determine damages. On May 30, 2007, the Circuit Court of Gloucester County, Virginia awarded the plaintiffs a judgment against Battle Creek in the amount of $268,900.00 for damages they sustained as a result of Battle Creek's breach of contract.

Thereafter, the plaintiffs sought to domesticate the Virginia judgment by filing this action in the Circuit Court of Marion County, Tennessee,[4] the county where Battle Creek's principal office is located. The plaintiffs' application to domesticate the foreign judgment was duly served on Battle Creek, however, Battle Creek did not file an Answer or other responsive pleading until the day the matter was set for hearing before the Circuit Court of Marion County. Immediately before the case was called for hearing, Battle Creek filed with the Circuit Court of Marion County a Motion to Dismiss, a Motion to Require Arbitration, and an Answer and Counter-Claim, alleging that the arbitration provision within the contract prevented the Virginia and Tennessee courts from exercising

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[2]The parties' Sales and Purchase Agreement identifies this as the address of Battle Creek.

[3]Virginia Supreme Court Rule 3:8 requires a defendant to "file pleadings in response within 21 days after service of the summons and complaint upon that defendant." "A defendant who fails timely to file a responsive pleading as prescribed in Rule 3:8 is in default. A defendant in default is not entitled to notice of any further proceedings in the case." Va. Sup. Ct. R. 3:19.

[4]The record does not provide the date the plaintiffs' application to domesticate the foreign judgment was filed.

jurisdiction, and that the Virginia judgment sought to be domesticated was void.[5] Battle Creek also asserted in the counter-claim that the plaintiffs had breached the contract by failing to seek arbitration. After hearing arguments from counsel, the judge requested both parties submit briefs, and took the matter under advisement pending receipt and review of the parties' briefs.

Four months later, on November 17, 2007, the Circuit Court for Marion County, Tennessee entered an order in which it found that the Virginia court had subject matter jurisdiction, that Battle Creek was properly served, and that Battle Creek had failed to timely raise its defenses in the Virginia action and, therefore, the Circuit Court of Marion County, Tennessee found that the Virginia judgment was entitled to full faith and credit. Whereupon, the court entered an order domesticating the Virginia judgment as though it were a judgment of this state. This appeal followed.

STANDARD OF REVIEW

Whether a foreign judgment is entitled to full faith and credit is a question of law. *Tareco Props. v. Morriss*, No. M2002-02950-COA-R3-CV, 2004 WL 2636705, at *12 n.20 (Tenn. Ct. App. Nov. 18, 2004). Issues of law are reviewed de novo with no presumption of correctness. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999). When an appellant challenges the foreign judgment on the ground that it is void under Tenn. R. Civ. P. 60.02, then we review the decision as whether the trial court abused its discretion in granting or denying relief under Tenn. R. Civ. P. 60. *Tareco Props.,* 2004 WL 2636705, at *12 n.20 (citing *Federated Ins. Co. v. Lethcoe*, 18 S.W.3d 621, 624 (Tenn. 2000); *Underwood v. Zurich Ins. Co.*, 854 S.W.2d 94, 97 (Tenn. 1993); *Ellison v. Alley*, 902 S.W.2d 415, 418 (Tenn. Ct. App. 1995)). A trial court abuses its discretion when it applies an incorrect legal standard. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001).

ANALYSIS

The Uniform Enforcement of Foreign Judgments Act provides the process for domesticating a foreign judgment in Tennessee. The relevant provision states:

> (a) A copy of any foreign judgment authenticated in accordance with the acts of congress or the statutes of this state may be filed in the office of the clerk of any circuit or chancery court of this state.
>
> (b) The clerk shall treat the foreign judgment in the same manner as a judgment of a court of record of this state.

[5] Battle Creek contended the Virginia court lacked jurisdiction because the plaintiffs did not submit the matter to arbitration first. It also argued that service of process was never properly perfected in the Virginia litigation or the litigation in Tennessee because the man served, T. Allan Holland, was not Battle Creek's registered agent.

> (c) *A judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of a court of record of this state and may be enforced or satisfied in like manner.*

Tenn. Code Ann. §26-6-104(a)-(c) (2008) (emphasis added). "[U]nder the terms of [the Act], the courts of this State will presume, absent proper proof to the contrary, that the decrees of the courts of record of any sister states are valid." *Four Seasons Gardening & Landscaping, Inc. v. Crouch*, 688 S.W.2d 439, 441-42 (Tenn. Ct. App. 1984) (footnote omitted). The burden is on the party attacking the validity of the foreign judgment to prove that it should not be given full faith and credit as required by Article 4, Section 1 of the United States Constitution. *Id*. at 442 (citing *Slidell v. Valentine*, 298 N.W.2d 599, 602 (Iowa 1980); *Riggs v. Coplon*, 636 S.W.2d 750, 755 (Tex. App. 1982); *Diners Club, Inc. v. Makoujy*, 443 N.Y.S.2d 116, 117 (1981)); *see also Marcus v. Marcus*, No. W2001-00906-COA-R3-CV, 2002 WL 1838140, at *2 ("The party challenging the validity of a foreign judgment faces a 'stern and heavy burden' in showing that the foreign judgment is not entitled to full faith and credit.") (quoting *Dement v. Kitts*, 777 S.W.2d 33, 36 (Tenn. Ct. App. 1989)). This court explained further in *Biogen Distrib., Inc. v. Tanner* that:

> Foreign judgments are ordinarily entitled to full faith and credit in Tennessee's courts. However, Tenn. Code Ann. § 26-6-104(c) states that they are subject to the same defenses and may be vacated or reopened on the same grounds and procedures used to vacate or reopen Tennessee judgments. Thus, the grounds and procedures for vacating or reopening foreign judgments are those contained in Tenn. R. Civ. P. 60.02.
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> Tenn. R. Civ. P. 60.02(3) states that a final judgment may be set aside if it is void. Therefore, not surprisingly, the two most common circumstances when courts will refuse to give full faith and credit to a foreign judgment are when the court entering the foreign judgment had no personal or subject matter jurisdiction and when enforcing the judgment would be contrary to Tennessee's public policy.

Biogen Distrib., Inc. v. Tanner, 842 S.W.2d 253, 256 (Tenn. Ct. App. 1992) (citations omitted).

Battle Creek, therefore, has the burden to demonstrate that the foreign judgment sought to be domesticated was void. We have determined that Battle Creek has failed to carry its burden.

Battle Creek first contends the Virginia court lacked jurisdiction because the plaintiffs did not first pursue arbitration as provided by the contract provision; however, Battle Creek has failed to cite, and we find no authority to support, the contention that an arbitration agreement, which is not pled as an affirmative defense or otherwise brought to the attention of the court presiding over a contract dispute, deprives that court of jurisdiction to preside over the parties or the matter at issue. To the contrary, it appears Battle Creek waived its contractual right to compel arbitration by not demanding arbitration in the Virginia court proceedings. This is because "an agreement to arbitrate may be waived by the actions of a party which are completely inconsistent with any reliance

thereon." *J.C. Bradford & Co., L.L.C. v. Kitchen*, No. M2002-00576-COA-R3-CV, 2003 WL 21077643, at *3 (Tenn. Ct. App. May 14, 2003) (quoting *Germany v. River Terminal Ry. Co.*, 477 F.2d 546 (6th Cir. 1973) (per curiam)) (holding that a party that failed to assert right to arbitration until after default judgment had been entered against it waived its right to arbitration); *see also Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 131 (2d Cir. 1997) (recognizing that a party waives the right to arbitrate where it delays the invocation of that right to the extent that the opposing party incurs "unnecessary delay or expense").[6]

Battle Creek's second issue, that of due process, was raised for the first time on appeal. "[I]ssues raised for the first time on appeal are waived." *Black v. Blount*, 938 S.W.2d 394, 403 (Tenn. 1996); *see also Norton v. McCaskill*, 12 S.W.3d 789, 795 (Tenn. 2000). Therefore, we find the issue of due process has been waived.

For its third issue, Battle Creek contends the Virginia judgment is "void" due to insufficient service of process. As the appellant, Battle Creek had the burden to provide a proper record,[7] *Vineyard v. Betty*, No. M2001- 00642- COA-R3-CV, 2002 WL 772870, *3 (Tenn. Ct. App. Apr. 30, 2002), and to make citations in its brief to the record to support its argument on appeal. *State v. Weaver*, No. M2001-00873-CCA-R3-CD, 2003 WL 1877107, at *16 (Tenn. Crim. App. Apr. 15, 2003) (citing Tenn. R. App. P. 27(a)(4), (7)); *see also Vineyard*, 2002 WL 772850, at *3 (citing Tenn. R. App. P. 24(b); *State v. Bunch*, 646 S.W.2d 158, 160 (Tenn.1983); *McDonald v. Onoh*, 772 S.W.2d 913, 914 (Tenn. Ct. App. 1989)).

Pursuant to Tennessee Rule of Appellate Procedure 27(a), Battle Creek, as the appellant, had the duty to provide a brief that contains, *inter alia*:

> (6) *A statement of facts, setting forth the facts relevant to the issues presented for review with appropriate references to the record*; and (7) An argument, which may be preceded by a summary of argument, setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and *appropriate references to the record (which may be quoted verbatim) relied on*; . .

Tenn. R. App. P. 27(a)(6)-(7) (2008) (emphasis added).

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[6] Because the shipment of the log home package was across state lines, state arbitration law was preempted by the Federal Arbitration Act. *J.C. Bradford & Co., L.L.C. v. Kitchen*, No. M2002-00576-COA-R3-CV, 2003 WL 21077643, at *3 (citing *Tenn. River Pulp & Paper Co. v. Eichleay Corp.*, 637 S.W.2d 853, 858 (Tenn.1982)). These cases applied the federal statute.

[7] In *Vineyard v. Betty*, we discussed the importance of Tenn. R. App. P. 24(a), which identifies the papers filed in the trial court that will be presumptively part of the record on appeal and instructs the parties on how to supplement or abridge these papers. 2002 WL 772870, at *3.

Battle Creek's brief is wholly deficient because there is not one citation to the record, nor is there any support for its assertions that the judgment is "void." Moreover, Battle Creek's brief contains little more than mere conclusory allegations, which are only supported by arguments of its counsel, neither of which constitute evidence we can consider. *See Vineyard*, 2002 WL 772870, *3 (citing *State v. Roberts*, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988)).

In the case of *Lykins v. Key Bank USA, N.A.*, No. E2005-01572-COA-R3-CV, 2006 WL 2482963, at *4-5 (Tenn. Ct. App. Aug. 29, 2006), we were presented with an appellant's brief that was much like the brief presented by Battle Creek, which also contained no citation to the record. After discussing the appellant's failure to comply with the Tenn. R. App. 27(a)(6), we discussed Rule 6(b) of the Rules of the Court of Appeals which provides that

> [n]o complaint of or reliance upon action by the trial court will be considered on appeal unless the argument contains a specific reference to the page or pages of the record where such action is recorded. No assertion of fact will be considered on appeal unless the argument contains a reference to the page or pages of the record where evidence of such fact is recorded.

Lykins, 2006 WL 2482963, at *4-5 (Tenn. Ct. App. Aug. 29, 2006) (quoting Tenn. R. Ct. App. 6(b)).

A similar situation arose in *Bean v. Bean*, where the brief contained similar deficiencies and failed to comply with Tenn. R. App. P. 27 and Rule 6 of the Rules of the Court of Appeals. *Id*. at *5 (citing *Bean v. Bean*, 40 S.W.3d 52-53 (Tenn. Ct. App. 2000)). In *Bean*, the deficiencies resulted in a dismissal of the appeal. There, we held:

> Courts have routinely held that the failure to make appropriate references to the record and to cite relevant authority in the argument section of the brief as required by Rule 27(a)(7) constitutes a waiver of the issue. *See State v. Schaller*, 975 S.W.2d 313, 318 (Tenn. Crim. App. 1997); *Rampy v. ICI Acrylics, Inc*. 898 S.W.2d 196, 210 (Tenn. Ct. App. 1994); *State v. Dickerson*, 885 S.W.2d 90, 93 (Tenn. Crim. App. 1993). Moreover, an issue is waived where it is simply raised without any argument regarding its merits. *See Blair v. Badenhope*, 940 S.W.2d 575, 576-577 (Tenn. Ct. App. 1996); *Bank of Crockett v. Cullipher*, 752 S.W.2d 84, 86 (Tenn. Ct. App. 1988).
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> Because of the numerous deficiencies in Appellant's brief, we decline to address the issues raised. As noted in *England v. Burns Stone Company, Inc.*, 874 S.W.2d 32, 35 (Tenn. Ct. App. 1993), parties cannot expect this court to do its work for them. This Court is under no duty to verify unsupported allegations in a party's brief, or for that matter consider issues raised but not argued in the brief. *Duchow v. Whalen*, 872 S.W.2d 692, 693 (Tenn. Ct. App. 1993) (citing *Airline Constr. Inc., v. Barr*, 807 S.W.2d 247 (Tenn. Ct. App. 1990)).

Bean, 40 S.W.3d at 55-56.[8]

The record before us clearly reveals that a Deputy Sheriff of Marion County, Tennessee served process on T. Allan Holland at Battle Creek's principal office in South Pittsburg, Tennessee. Battle Creek has failed to establish why this service was insufficient; instead, it merely contends that the "registered agent" of Battle Creek was the only person who could be served. This, of course, is an erroneous contention. *See* Va. Code Ann. § 8.01-301(1) (2008) ("[S]ervice of process upon a foreign corporation may be effected . . . [b]y personal service on any officer, director or on the registered agent of a foreign corporation which is authorized to do business in the Commonwealth."); *see also* Tenn. R. Civ. P. 4.04(4). Moreover, as stated in *Bean* above, we are under no duty to verify unsupported allegations in Battle Creek's brief or to consider an issue raised but not properly argued in its brief. *Bean*, 40 S.W.3d at 55-56 (citing *Duchow*, 872 S.W.2d at 693; *Airline Constr. Inc.*, 807 S.W.2d 247). For the foregoing reasons, we find no merit to the contention that service on Battle Creek in the initial proceeding was insufficient.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Battle Creek Milling & Supply Co., Inc. and its surety, for which execution may issue.

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FRANK G. CLEMENT, JR., JUDGE

[8]The analysis in *Bean* has been subsequently relied upon in cases "when issues were not properly addressed or presented in briefs." *Lykins*, 2006 WL 2482963, at *5 (citing *Walker v. Huff*, No. E2005-01096-COA-R3-CV, 2006 WL 721308 (Tenn. Ct. App. March 22, 2006); *Ray v. Ray*, No. E2004-01622-COA-R3-CV, 2005 WL 1981801 (Tenn. Ct. App. August 16, 2005)).